No. 18-315

In The
Supreme Court of the United States

COCHISE CONSULTANCY, INC. AND
THE PARSONS CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA EX REL.
BILLY JOE HUNT,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR *AMICUS CURIAE* PROFESSOR JOEL D. HESCH IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Professor Joel D. Hesch is a tenured professor at Liberty University School of Law and an expert on the False Claims Act (FCA). He is the author of several scholarly articles relating to the FCA.[2] Professor Hesch has been previously authorized to submit amicus briefs in four other FCA cases before this Court.[3] From 1990 to 2006, Professor Hesch

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[1] The parties have consented to the filing of this brief and notice has been provided to counsel of record. No counsel for a party authored this brief in whole or in part, and no counsel or party made any monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae made a monetary contribution to its preparation or submission.

[2] Joel D. Hesch and Mia Yugo, *Can Statistical Sampling Be Used to Prove Liability Under the FCA or Does Each Provision of the Statute Require Individual Proofs?*, 41 Am. J. Trial Advoc. 335 (2018); Joel D. Hesch, *Restating the 'Original Source Exception' to the False Claims Act's 'Public Disclosure Bar' in light of the 2010 Amendments*, 51 U. Rich. L. Rev. 991 (2017); Joel D. Hesch, *It Takes Time: The Need to Extend the Seal Period for Qui Tam Complaints Filed under the False Claims Act*, 38 Seattle L. Rev. 901 (2015); Joel D. Hesch, *The False Claims Act Creates a 'Zone of Protection' That Bars Suits Against Employees Who Report Fraud Against the Government*, 62 Drake L. Rev. 361 (2014); Joel D. Hesch, *Breaking the Siege: Restoring Equity and Statutory Intent to the Process of Determining Qui Tam Relator Awards under the FCA*, 29 T.M. Cooley L. Rev. 217 (2012).

[3] Brief for *Amicus Curiae* Professor Joel D. Hesch in support of Respondents, dated March 2, 2016, filed in *Universal Health Services, Inc. v. U.S. ex rel. Julio Escobar* (No. 15-7); Brief for *Amicus Curiae* Professor Joel D. Hesch in support of Petitioner, dated April 6, 2015, filed in *U.S. ex rel. Gonzalez v. Planned Parenthood of Los Angeles* (No. 14-1080); Brief for *Amicus Curiae* Professor Joel D. Hesch in Support of Respondents,

worked as a trial attorney in the Civil Fraud Section of the Department of Justice (DOJ), where he conducted nationwide FCA investigations affecting twenty different Government agencies. While at DOJ, he facilitated cases recovering more than one billion dollars, including the trial of *Rockwell v. United States*, 549 U.S. 457 (2007). He now teaches Civil Procedure as a professor and represents whistleblowers as a private attorney. Professor Hesch offers his scholarship and unique experiences with the FCA to aid this Court in ruling upon the circuit split pertaining to the FCA's statute of limitations.

SUMMARY OF ARGUMENT

The FCA's ten-year statute of limitations must be applied to declined *qui tam* complaints because it is patently clear that there is only one FCA statute of limitations to redress submissions of false claims to the Government, and it allows ten years provided that a FCA complaint is filed by relator or the Government within three years of when certain named Government officials with actual authority to act have knowledge of the fraud. At no point does the FCA seek to apply a separate statute of limitations for submission of false claims against the Government dependent upon whether they are raised by the Government or in a *qui tam* complaint, let alone whether a *qui tam* complaint is declined.

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dated January 22, 2008, filed in *Allison Engine Comp. v. U.S. ex rel. Sanders* (No. 07-214); Brief for *Amicus Curiae* Professor Joel D. Hesch in Support of Petitioner, dated June 26, 2014, filed in *U.S. ex rel. Gurumurthy Kalyanaram v. New York Institute of Technology* (No. 13-1444).

This plain reading of the statute is fully supported by two other FCA provisions impacting the statute of limitations. First, the FCA mandates that Government intervention in a *qui tam* complaint must relate back to the relator's filing. 31 U.S.C. § 3731(c). Second, the FCA allows the Government to intervene after declining. 31 U.S.C. § 3731(c)(3). These two FCA provisions are inconsistent with a court creating a separate statute of limitations for declined *qui tam* complaints. Moreover, creating a separate statute of limitations for declined *qui tam* complaints ignores the fact that the Government is the real party of interest in *qui tam* suits, *U.S. ex rel. Eisenstein v. City of New York, New York*, 556 U.S. 928, 930 (2009), and retains ultimate control over *qui tam* cases. *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000). Indeed, the FCA grants the Government authority to dismiss a *qui tam* complaint for good cause, 31 U.S.C. § 3731(c)(2)(A), settle the *qui tam* complaint over the objection of the relator, *id.* at § 3731(c)(2)(B), and limit the relator's participation in the case upon a showing of good cause. *Id.* at § 3731(c)(2)(C) and (D).

In addition, because *qui tam* complaints, including declined *qui tam* complaints, redress an important Government interest, the FCA's statute of limitations must be strictly construed to accomplish the goal of recovering back all of the ill-gotten taxpayers' funds alleged in *qui tam* complaints. *Badaracco v. Comm'r*, 464 U.S. 386, 39 (1984). Indeed, the FCA is the Government's most important anti-fraud tool and *qui tam* complaints account for most of the FCA recoveries. In the last ten years

(2009-2018), *qui tam* complaints accounted for 90 percent of all healthcare fraud recoveries under the FCA, and in the last five years *qui tam* complaints consisted of 94.8 percent of all FCA healthcare recoveries under the FCA.[4] Declined *qui tam* complaints also play an important role, accounting for 4 percent of all FCA recoveries.[5] Because the Government has retained 83 percent of all funds recovered in *qui tam* complaints since 1986,[6] *qui tam* complaints are a vital component of the FCA and represent an important Government interest.

Moreover, there is no serious risk that an absurd result will occur by applying the statute of limitations as Congress crafted it. Indeed, Congress itself understood that a relator might otherwise have an incentive to delay filing and built into it sufficient safeguards. The FCA contains not one, but three separate provisions that fully account for any intentional delays by a would-be relator, i.e. first-to-file bar, 31 U.S.C. § 3730(b)(5), public disclosure bar, *id.* at § 3730(e)(4)(A), and Government action bar, *id.* at § 3730(e)(3), each of which de-incentivize a relator to delay. Accordingly, Congress was not unaware that there might be a risk that a relator might delay filing and addressed it appropriately. Thus, there is no need or room for this Court to rewrite the statute

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[4] These statistics are based on FCA data published by the Department of Justice, "Fraud Statistics – Overview, Oct. 1, 1987 – Sept. 30, 2018, U.S. DEP'T OF JUSTICE," located at: https://www.justice.gov/civil/page/file/1080696/download. *See infra* note 14.

[5] *See infra* note 13.

[6] *Infra* note 15 and surrounding text.

of limitations to create a separate statute of limitations for declined *qui tam* complaints. To do so would only frustrate an important Government interest of recovering ill-gotten taxpayers' funds.

Petitioners' other so-called absurd result also rings hollow. Petitioners wrongly suggest that relators would enjoy a longer period of time than the Government if the ten-year provision applied to them. Petitioner Brief at 26. The ten-year provision is always exactly the same regardless of whether the case is initiated by relators or the Government. It extends to ten years only if a FCA complaint is filed (either by the Government or relators) within three years of when the named Government officials charged with authority to act have knowledge. The date of knowledge of such Government officials is the key and does not fluctuate depending upon whether relators file a *qui tam* complaint or the FCA case is initiated by the Government. Indeed, Congress intended this result because Government intervention will relate back to the filing of a *qui tam* complaint. 31 U.S.C. § 3731(c). Thus, a FCA suit must be initiated within three years of when the named Government officials charged with authority to act have knowledge. If a relator delays beyond three years of such Government knowledge, the relator cannot rely upon the ten-year rule. Nor would it cause headaches or difficult discovery to determine the date of such Government knowledge (Petitioners Brief at 32), because, as shown below, the date of such knowledge is limited to the Attorney General and his delegates, i.e. Assistant United States Attorneys, who have authority to address FCA allegations. These are the same Government officials

appearing in the FCA case. Thus, it is quite easy to know exactly when the fraud allegations were received by such Government officials because they open files for each FCA allegation. Therefore, it is simply a matter of the Government officials appearing in the FCA case disclosing the date they received the fraud allegations.

With respect to the second issue, whether the relator constitutes an "official of the United States charged with responsibility to act" the plain text of the FCA forecloses any such reading. It is clear on its face that Congress intended the three-year knowledge period to apply only to Government officials possessing actual authority to act, which cannot be a relator. Indeed, by law, only the Attorney General (and his delegates) has authority to compromise FCA allegations.[7] The Attorney General delegated authority to certain attorneys in the DOJ offices in Washington, D.C, and in cases with certain dollar thresholds to the U.S. Attorneys Offices. *See* Joel D. Hesch, *It Takes Time: The Need to Extend the Seal Period for Qui Tam Complaints Filed Under*

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[7] "The Attorney General and his delegated agents have the exclusive authority to enforce the FCA and to prosecute claims for fraud on the government. *See* [31 U.S.C.] § 3730 (stating that FCA claims can only be brought by the Attorney General or a private person suing in the name of the United States); see also [31 U.S.C.] § 3711(b)(1) (providing that agencies are permitted to settle and compromise certain claims but not fraud claims); 28 C.F.R. § 0.45(d) (2011) (assigning common-law fraud claims to the Assistant Attorney General, Civil Division)." Joel D. Hesch, *Breaking the Siege: Restoring Equity and Statutory Intent to the Process of Determining Qui Tam Relator Awards Under the False Claims Act*, 29 T.M. Cooley L. Rev. 217, 265 fn. 281 (2012).

the False Claims Act, 38 Seattle U. L. Rev. 901, 918 (2015) (citations omitted). Thus, the Government officials spoken of within the FCA's statute of limitations is limited to knowledge of the Government attorneys responsible for litigating FCA cases, i.e. attorneys in the Civil Fraud Section of the Department of Justice in Washington, D.C. and Assistant United States Attorneys. Thus, it is clear that an "official of the United States charged with responsibility to act" cannot include knowledge of the relator. Rather, the relator's knowledge only becomes relevant when he turns information over to a Government official charged with authority to act and puts them on notice of the fraud allegations, which triggers the three-year clock.

ARGUMENT

I. THE FALSE CLAIMS ACT'S STATUTE OF LIMITATIONS NOT ONLY IS PLAIN AND UNAMBIGUOUS, BUT MUST BE STRICTLY CONSTRUED TO PROTECT RECOVERY OF FEDERAL FUNDS LOST TO FRAUD

There are two reasons why the FCA's statute of limitations must be interpreted as allowing ten years for *qui tam* complaints seeking the recovery of federal funds regardless of whether the Government ultimately intervenes in the case. First, the language is plain and unambiguous and must be given its stated meaning. Second, because the statute of limitations at issue operates to restrict the Government's interest in recouping taxpayers' funds lost to fraud, it must be strictly construed in favor of

maximizing the stated statute of limitations in protecting such Government interest.

A. The Statute of Limitations is Plain and Unambiguous in Providing a Ten-Year Period for *Qui Tam* Complaints

When "statutory text is plain and unambiguous" a court "must apply the statute according to its terms." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002). As shown below, not only is the language at issue plain and unambiguous, but there are other FCA provisions that make clear that Congress intended the ten-year statute of limitations to apply to both relator and Government filed complaints.

The FCA's statute of limitations reads:

> A civil action under section 3730 may not be brought--
> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which

> the violation is committed, whichever occurs last.

31 U.S.C. § 3731(b).

It is clear that for submissions of false claims against the Government the FCA's statute of limitations is a minimum of six year, but extends to ten years if a FCA complaint is filed within three years of when Government officials charged with authority to act have knowledge of the fraud.

At no point does the FCA seek to apply a separate statute of limitations for submission of false claims to the Government based upon whether the allegations are contained in a *qui tam* complaint or a case filed solely by the Government. In short, there is but one FCA statute of limitations to redress fraud against the Government, and it allows ten years provided that a FCA complaint is filed either by a relator or the Government within three years of when certain named Government officials possess knowledge of the fraud.

The FCA contains other provisions relating to the statute of limitations, which further demonstrate that there is not a separate statute of limitations based upon whether a *qui tam* complaint is intervened or declined. Congress included within the FCA a mandate that Government intervention must relate back to the filing of a *qui tam*, as follows:

> If the Government elects to intervene and proceed with an action brought under 3730(b), the Government may file

> its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.

31 U.S.C. § 3731(c) (emphasis added). By clarifying that Government intervention must relate back to the date of a *qui tam* Complaint, it leaves no doubt that there is but one statute of limitations for fraud against the Government, regardless of whether the case was initiated by a relator or the Government.

There is also a second FCA provision that further cements that Congress never intended there to be a separate statute of limitations dependent upon whether a *qui tam* complaint was declined. Specifically, the FCA allows the Government to join a *qui tam* case after declining, which reads:

> If the Government elects not to proceed with the action, the person who initiated the action shall have the right

> to conduct the action. *** When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

31 U.S.C. § 3731(c)(3).

It would lead to absurd results if a court created a separate limitation period just for declined *qui tam* cases. For example, assume a *qui tam* complaint alleges harm occurring over the past seven years and the Government declines. Now assume that a court holds that due solely to the fact that the *qui tam* case is declined, the statute of limitations is six not ten years, even though no Government official knew of the fraud prior to the filing of the *qui tam*. Under this approach, the relator may only proceed for the past six years. Now assume that one year later, after discovery has begun based upon the *qui tam* complaint, the Government is allowed to intervene for good cause. If there are two statutes of limitations—one for Government intervened *qui tam* complaints and another for Government declined *qui tam* complaints—the statute of limitations would automatically switch in the midst of the case the moment the Government intervened. That defies logic and finds no support within the language of the FCA.

The fact that the Government can always intervene after declining renders any interpretation based upon a declined *qui tam* status absurd. Going

one step further, even without Government declination, that approach would also mean that the day a *qui tam* suit is filed, the statute of limitations is six years but switches to ten years if the Government timely intervenes. The plain language of the FCA does not create a "limbo" statute of limitations either by word or intent. In fact, there is not a single word within the statute of limitations that allows for such an interpretation.

Finally, dividing up the statute of limitations into whether the case is the product of a declined *qui tam* complaint ignores the fact that the Government is always the real party interest. *U.S. ex rel. Eisenstein v. City of New York, New York*, 556 U.S. 928, 930 (2009). Even in a declined *qui tam* case it is the Government who suffered the loss. It remains a FCA complaint to remedy fraud against the taxpayers. In fact, this Court has held that the reason the *qui tam* provisions are constitutional is because it is the Government that sustained the injury and the Government retains ultimate control over the FCA allegations in a *qui tam* case. *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000). Indeed, the FCA grants the Government the authority to (1) dismiss a *qui tam* complaint for good cause,[8] (2) settle the *qui tam* complaint over the objection of the relator,[9] and limit

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[8] 31 U.S.C. § 3731(c)(2)(A) ("The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.").

[9] *Id.* at § 3731(c)(2)(B) ("The Government may settle the action with the defendant notwithstanding the objections of the person

the relator's participation in the case upon a showing of good cause.[10]

For all of these reasons, the language of the FCA plainly and ambiguously created a single ten-year statute of limitations for submission of false claims against the Government, regardless of whether initiated by a *qui tam* complaint and regardless of whether the Government intervenes.

B. The FCA's Statute of Limitations Must be Strictly Construed to Protect, not Restrict, Recoveries of Taxpayer's Funds Lost to Fraud

There is a second reason why the ten-year statute of limitations applies to declined *qui tam* complaints. Specifically, statutes of limitations involving a Government interest must be strictly construed in favor of protecting the Government interest, and a declined *qui tam* complaint constitutes a Government interest.

Congress has the power to create whatever length of statute of limitations is desires to protect a particular Government interest. In fact, absent the Government enacting a statute of limitations, there is no limitation against the Government. *E.g., United States v. Summerlin*, 310 U.S. 414, 416 (1940) ("It is

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initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.").

[10] *Id.* at § 3731(c)(2)(C) and (D).

well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights.").[11] When Congress does act, the "[s]tatutes of limitation sought to be applied to bar rights of the Government, must receive a strict construction in favor of the Government." *Badaracco v. Comm'r*, 464 U.S. 386, 39 (1984). Because the Government is the "real party in interest" and the entity that suffered the harm, *Eisenstein*, 556 U.S. at 930, courts must strictly construed the FCA's statute of limitations in favor of recovering of taxpayers' funds lost due to fraud. That means that the ten-year limitation period should broadly (not narrowly) apply. Accordingly, courts cannot inject into the FCA's ten-year statute of limitations a new or unstated requirement that it only applies when the Government files suit or intervenes in a *qui tam* case. Not only does the FCA itself not impose such a restriction or requirement, but for a court to do so would improperly reduce the amount of taxpayers' funds recovered due to fraud and negatively impact an important Government right.

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[11] With respect to filing fraudulent tax returns, there is no statute of limitations. E.g., Payne v. Comm'r, 224 F.3d 415, 420 (5th Cir. 2000) ("The only exception to the general three-year limitations rule of § 6501(a) that is implicated in this appeal is § 6501(c)'s statutory tax fraud exception, which provides: 'In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.").

1. *Qui Tam* Complaints Constitute an Important Government Interest

There is no doubt that *qui tam* complaints redress an important Government interest and thus the statute of limitations must be strictly construed to accomplish the goal of recovering back all of the ill-gotten taxpayers' funds from *qui tam* cases. As much as ten percent of all federal Government spending is lost due to fraud. Joel D. Hesch, *Breaking the Siege: Restoring Equity and Statutory Intent to the Process of Determining Qui Tam Relator Awards Under the False Claims Act*, 29 T.M. Cooley L. Rev. 217, 265 (2012). The chief tool to combat fraud is the FCA. *E.g., United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 267 (5th Cir. 2010). Within the FCA, *qui tam* suits are the most potent weapon. Since the modernization of the FCA in 1986, 72 percent of all of the Government's FCA recoveries were from *qui tam* complaints.[12] Declined *qui tam* complaints also play a prominent role, consisting of 4 percent of all FCA monetary recoveries.[13] The importance of *qui tam* complaints is growing stronger each year, especially in the healthcare sector. In the last ten years (1987–2018), *qui tam*

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[12] These statistics are based on FCA data published by the Department of Justice, "Fraud Statistics – Overview, Oct. 1, 1987 – Sept. 30, 2018, U.S. DEP'T OF JUSTICE," located at: https://www.justice.gov/civil/page/file/1080696/download. The total FCA recoveries since 1986 amounted to $59 billion, of which *qui tam* cases accounted for $42.5 billion, consisting of 72 percent. *Id.*

[13] The total FCA recoveries (both *qui tam* and Government initiated) from 1986 to 2018 amounted to $59 billion and the total recoveries in declined *qui tam* cases amounted to $2.47 billion, equating to 4.18 percent. *Id.*

suits accounted for 90 percent of all healthcare fraud recoveries under the FCA, and in the last five years *qui tam* complaints consisted of 94.8 percent of all FCA healthcare recoveries under the FCA.[14]

The Government is also the real victor in *qui tam* complaints. Since 1986, of the $42.5 billion recovered in *qui tam* complaints the Government netted $35.5 billion by paying out relator awards of $7 billion.[15] Thus, the Government retained 83 percent of all funds recovered in *qui tam* complaints since 1986, which means that *qui tam* complaints, including declined *qui tam* complaints, are a vital component of the FCA and represent an important Government interest. Accordingly, the statute of limitations must be strictly construed in favor of an expansive interpretation and the ten-year FCA statute of limitations must be applied to declined *qui tam* complaints.

C. The Ten-Year Statute of Limitations would not Lead to Absurd Results when Applied to Declined *Qui Tam* Complaints

One reason for the circuit split is because some courts have mistaken this Court's ruling in *Graham*

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[14] The total FCA healthcare recoveries from 2009 to 2018 amounted to $24.1 billion and the total recoveries in *qui tam* healthcare cases amounted to $21.9 billion, equating to 90 percent. *Id.* The total FCA healthcare recoveries from 2014 to 2018 amounted to $11.6 billion and the total recoveries in *qui tam* healthcare cases amounted to $11 billion, equating to 94.8 percent. *Id.*

[15] *Id.*

County Soil & Water Conservation District v. United States ex rel. Wilson, 545 U.S. 409 (2005) as an invitation to substitute their own judgment for Congress anytime a theoretical absurd result might occur. The Fourth Circuit led the way by wrongly suggesting that a plain reading of the statute of limitations could lead to the absurd result of a potential relator intentionally delaying filing a *qui tam* case merely to increase the harm to the Government so that the award will be higher. *See U.S. ex rel. Sanders v. N. Am. Bus Indus., Inc.*, 546 F.3d 288, 295 (4th Cir. 2008) ("a strong financial incentive to allow false claims to build up over time before they filed" suit, rather than immediately initiating litigation that would bring a prompt end to the defendant's fraud").

There are two reasons why *Graham* does not support the Petitioners nor allow this Court to rewrite the plain and unambiguous statute. First, *Graham* is clearly distinguishable. Second, there is no absurd result in applying the plain language of the statute.

In *Graham*, the statute of limitations at issue addressed a private cause of action in a different section of the FCA brought by the relator to redress retaliation as a whistleblower. 545 U.S. 409. The Court was not facing allegations of false claims against the Government. Because Congress had not included a statute of limitations for the private wrong, the Court ruled that it would be absurd to apply the FCA's statute of limitations affecting fraud against the Government. *Graham*, 545 U.S. at 417. Rather, the Court needed to apply a comparable

limitations period for private causes of action. *Id.* at 414. As such, the ambiguity whether the FCA statute of limitations applies to private causes of action for retaliation faced in *Graham* has no relevance to this case involving *qui tam* allegations of false claims against the Government.

In any event, there is no absurd result. The problem with the Fourth Circuit's relator delay theory is that it flies in the face of the structure of the FCA that already contains provisions that operate to eliminate this very risk. As an initial matter, this hypothetical delay problem can only apply if a relator purposefully sits on fraud allegations in years seven through ten, because the minimum statute of limitations is six years for a relator to file a FCA case. The purported concern is that a would-be relator might choose to wait between seven to ten years to file a *qui tam* complaint, instead of in years one through six, simply to accrue a few additional years of damages. Fortunately, Congress already solved this potential problem within the FCA through three separate provisions that de-incentivize relators from delaying in filing *qui tam* complaints.

First, the FCA has a "first-to-file" bar, which only allows the first relator to be eligible for an award. 31 U.S.C. § 3730(b)(5) ("no other person other than the Government may intervene or bring a related action based on the facts underlying the pending action"). In fact, the first to file bar actually creates a race to the courthouse among would-be relators. *E.g.*, *Campbell v. Redding Med. Center*, 421 F.3d 817, 821 (9th Cir. 2005) (The first-to-file bar "encourages

prompt disclosure of fraud by creating a race to the courthouse among those with knowledge of fraud."). Accordingly, it defies logic for a relator to forgo filing a case until years seven through ten just to add a year or two more because she would lose everything if another relator beats her to the courthouse. The real problem with this delay theory is that it assumes there is only one potential relator with knowledge of the fraud, when in fact, every employee of the wrongdoing company is a potential relator and they each have an incentive to become the first to file and not simply waiting seven to ten years so that the pot of gold might increase. In short, the waiting game is illusionary because any other relator can beat a delaying relator to the punch.

Second, a hypothetical relator playing the seven to ten year waiting game also risks losing out on any award due to the FCA's "public disclosure" bar. 31 U.S.C. § 3730(e)(4)(A) (2010). If the fraud allegations get publicly disclosed at any time prior to filing a *qui tam* case, the delaying relator is barred unless he satisfies the "original source exception." 31 U.S.C. § 3730(e)(4)(B) (2010). In short, Congress added the public disclosure bar as an added incentive for a relator to swiftly come forward, i.e. before a qualifying public disclosure, or face the task of establishing that his complaint materially adds to the public disclosure.[16] Thus, the public disclosure

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[16] "The 2010 original source exception can be met in one of two ways: either (1) a relator told the government about the fraud before a qualifying public disclosure, or (2) a relator's information is 'independent of and materially adds' to the public disclosure." Joel D. Hesch, *Restating the "Original Source Exception" to the False Claims Act's "Public Disclosure Bar" in Light of the 2010 Amendments*, 51 U. Rich. L. Rev. 991,

bar dramatically reduces any real problem of hypothetical relators purposefully delaying filing for seven to ten years.

Third, Congress added another poison pill within the FCA for relators who would seek to delay seven to ten years to file. The "Government action" bar prevents a relator from filing a *qui tam* complaint when the Government has a pending FCA case alleging the same fraud. 31 U.S.C. § 3730(e)(3) ("In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party."). Although most FCA cases are the product of *qui tam* complaints, the Government sometimes catches fraud and files suit without a *qui tam* being filed, such as receiving a tip from a whistleblower that chooses not to file a *qui tam* or through routine audits. If the Government files its own complaint first, a relator cannot obtain a reward. *Id.*

In sum, there is no serious risk that an absurd result will actually occur by applying the statute of limitations as Congress crafted it. Indeed, Congress itself understood that a relator might otherwise have an incentive to delay filing and built into it sufficient safeguards. The FCA contains not one, but three separate provisions that fully account for any intentional delays by a would-be relator. Accordingly, Congress was not unaware of this risk and addressed it appropriately. Congress also knew what it was

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994 (2017).

doing when it drafted a single statute of limitations provision to apply to all FCA violations, regardless of whether initiated by the relator or the Government. Thus, there is no need or room for this Court to rewrite the statute of limitations to create a separate statute of limitations for declined *qui tam* complaints. To do so would only frustrate an important Government interest of recovering ill-gotten taxpayers' funds.

1. The Statute of Limitations would not be Longer for Relators, as Petitioners Incorrectly Suggest

Petitioners conjure up a second potentially absurd result by suggesting that the limitation period would be longer for relators than for the Government. Petitioner Brief at 26-27. Petitioners argue that under the Eleventh Circuit approach, the limitations period is never triggered for a relator, but only applies to the Government. *Id.* Petitioners are mistaken. The ten-year provision is always exactly the same regardless of whether the case is initiated by relators or the Government. It extends to ten years only if a FCA complaint is filed (either by the Government or relators) within three years of when the named Government officials charged with authority to act have knowledge of the fraud allegations. The date of knowledge of such Government officials is the key and does not fluctuate depending upon whether relators file a *qui tam* complaint or the FCA case is initiated by the Government. The statute is clear; for the ten-year provision to apply a FCA suit must be initiated within three years of when the named Government

officials charged with authority to act have knowledge. If the relator files suit four years after the named Government officials have knowledge of the fraud, the ten-year provision does not apply. Thus, the relator does not enjoy a longer period than the Government.

Nor would it cause headaches or difficult discovery to determine the date of such Government knowledge (Petitioners Brief at 32), because, as shown below, such knowledge is limited to the Attorney General and his delegates, i.e. Assistant United States Attorneys, who have authority to address FCA allegations. It is easy to know exactly when the FCA allegations was received by such named Government officials because they formally open a file whenever they receive FCA allegations. It would be a simple matter of the Government officials with authority to act, which are the very Government attorneys appearing in the FCA case, to inform the parties and the court the date on which they received the FCA allegations.

II. AN "OFFICIAL OF THE UNITED STATES CHARGED WITH RESPONSIBILITY TO ACT" DOES NOT INCLUDE A RELATOR

The second issue before this Court is whether the relator constitutes an "official of the United States charged with responsibility to act." The plain text of the FCA forecloses any such readings. Under the FCA, the statute of limitations is ten years provided that a FCA complaint is filed either by a relator or the Government within three years of when Government officials with actual authority to

compromise FCA cases have knowledge of the fraud. The FCA defines the duration of the statute of limitations as

> more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the **official of the United States charged with responsibility to act** in the circumstances, but in no event more than 10 years after the date on which the violation is committed.

31 U.S.C. § 3731(b)(2) (emphasis added).

It is clear on its face that Congress intended the three-year knowledge period to apply only to Government officials possessing actual authority to act, which cannot be a relator (or any other person other than the named officials). As articulated in a law review article by Professor Hesch, the named Government officials under this provision means the Attorney General and his delegates:

> With respect to identifying the appropriate government officials with knowledge, Congres s provided the answer. First, it appointed the Attorney General as the only government official with authority to compromise an FCA case or common-law fraud claim. [17] The

[17] "The Attorney General and his delegated agents have the exclusive authority to enforce the FCA and to prosecute claims for fraud on the government. See [31 U.S.C.] § 3730 (stating that FCA claims can only be brought by the Attorney General or a private person suing in the name of the United States); see

> Attorney General delegated authority to certain attorneys in the DOJ offices in Washington, D.C, and in cases with certain dollar thresholds to the USAO nationwide. [18] Second, under the FCA, Congress included a three-year tolling provision of the statute of limitations that applies until the 'facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances . . . .'

Joel D. Hesch, *Breaking the Siege: Restoring Equity and Statutory Intent to the Process of Determining Qui Tam Relator Awards Under the False Claims Act*, 29 T.M. Cooley L. Rev. 217, 265 (2012).

In short, Congress had a very specific meaning when it used the phrase "official of the United States charged with responsibility to act." Indeed, "[b]y law, the Attorney General is the only Government official

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also [31 U.S.C.] § 3711(b)(1) (providing that agencies are permitted to settle and compromise certain claims but not fraud claims); 28 C.F.R. § 0.45(d) (2011) (assigning common-law fraud claims to the Assistant Attorney General, Civil Division)." Joel D. Hesch, *Breaking the Siege: Restoring Equity and Statutory Intent to the Process of Determining Qui Tam Relator Awards Under the False Claims Act*, 29 T.M. Cooley L. Rev. 217, 265 fn. 281 (2012).

[18] "28 C.F.R. § 0.45(d) (assigning common-law fraud claims to the Assistant Attorney General, Civil Division); 28 C.F.R. Pt. 0, Subpt. Y, App. (assigning FCA cases where damages will not exceed $1,000,000 to the USAO)." *Id.* at 265 fn. 282.

with authority to settle an FCA case." Joel D. Hesch, *It Takes Time: The Need to Extend the Seal Period for Qui Tam Complaints Filed Under the False Claims Act*, 38 Seattle U. L. Rev. 901, 918 (2015) (citations omitted). "However, the Attorney General delegated authority to certain attorneys in DOJ offices in Washington, D.C.; these offices are the Civil Division, Commercial Litigation Branch, Fraud Division (DOJ Civil Frauds), and in cases under certain dollar thresholds, to USAOs nationwide." *Id.* Thus, the Government officials spoken of within the FCA's statute of limitations is limited to knowledge of the Government attorneys responsible for litigating FCA cases, i.e. Assistant United States Attorneys and the attorneys in the Civil Fraud Section of the Department of Justice in Washington, D.C. They are the only Government officials with authority established by Congress to act upon FCA cases. Thus, it is clear that the persons with knowledge spoken of in the FCA's statute of limitations cannot include knowledge of the relator (or for that matter, any other Government employee). Rather, the relator's knowledge only becomes relevant when she turns that information over to the Government officials charged with authority to act, such as by filing a *qui tam* case.

It would be absurd to consider employees of the wrongdoing company a Government official with authority to act. First, Congress limited the knowledge to a few very specific Government officials possessing actual authority to compromise FCA allegations, and did not intend this provision to include any and all Government employees with knowledge, let alone employees of the wrongdoer who

ultimately file a *qui tam* complaint. Second, the Government is the real party in interest in a *qui tam* suit, not the relator. *Eisenstein*, 556 U.S. at 930. Third, as discussed earlier, the FCA includes many other restrictions that bar relators from proceeding, including the first to file bar, the public disclosure bar, and the Government action bar. Indeed, these same Government officials with authority to act identified within the statute of limitations provision are the same Government officials Congress granted ultimate authority over *qui tam* complaints, including the power to dismiss, settle, or limit participation of the relator.[19]

In short, Congress did not want the three-year knowledge standard within this provision to run when any Government employee had some knowledge of the fraud. Nor did it want it to include when employees of the wrongdoing entity became aware of the fraud. Rather, Congress adopted a ten-year statute of limitations provided that a FCA complaint is filed either by a relator or the Government within three years of when named Government officials with actual authority to act have knowledge of the fraud. Accordingly, a relator does not constitute "the official of the United States charged with responsibility to act."

CONCLUSION

For the reasons stated above, the judgment of the Eleventh Circuit should be affirmed.

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[19] *See supra* notes 8-10 and surrounding text.

Respectfully submitted,

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